IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. .

SOUTHERN STEAMSHIP COMPANY,
Petitioner,

v.

C. M. MEYNERS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

No opinion was rendered by the Trial Judge, the Honorable Thomas M. Kennerly.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was written by Circuit Judge McCord (R. 590) and was filed on March 20, 1940, and is reported in 110 F. (2d) 376.

No opinion was written by the Circuit Court of Appeals on the order denying petition for reargument.

For Jurisdiction, Statement of the Matter Involved and Questions Presented see pages 2 to 8 of the petition.

ARGUMENT.

The decision of the court below holding, as a matter of law, that the operator of the crane was the servant of the petitioner was in conflict with the decisions of the Supreme Court of Texas.

The trial court at the conclusion of all of the evidence ruled (R. 543):

> "I think that this operator of the crane was at the time of the accident the agent of the Southern Steamship Company, and I think that I ought to hold that he was as a matter of law."

The Circuit Court of Appeals affirmed this holding.

The petitioner contends that the giving of directions and signals by its various employees to the crane operator was nothing more than necessary cooperation to enable the operator to perform his master's work.

The petitioner was engaged in unloading one of its ships. The taking of the pipe out of the holds of the ship was done with the aid of the ship's appliances which were operated by the employees of the petitioner. That part of the operation was completed when the pipe was landed on the wharf. The crane was used to move it from that point to railroad cars. It is obvious that chaos would result if the crane operator was not informed as to the order in which the pipe was to be handled and where it was to be placed. In this connection all that the employees of the petitioner did was to point out to the crane operator the location of the pipes to be moved and the place to which they were to be moved.

The crane operator was some 35 feet above the ground, immediately under the beam of his crane, the operation of which required the handling of various controls.

No representative of the petitioner had the power or ability to control the manner in which the crane operator operated the crane, either as to the speed of raising or lowering the drafts of pipe or as to the speed at which the crane traveled along its tracks.

The Navigation District was in the business of renting its equipment for hire. It charged an hourly rate which included the services of the operator. The tariff does not provide for the use of the crane without an operator. Consequently, the petitioner was forced to take the operator furnished by the Navigation District and could not use any other operator.

The petitioner had no authority to discharge the operator furnished by the Navigation District.

The operator in question was a regular employee of the Navigation District and was regularly engaged as an electrician. When the crane was not in operation he was doing other work for the Navigation District and was, at all times, carried on its payroll.

In these circumstances the petitioner cannot be said to have had the ability or right to control the crane operator. There was lacking the right to select the employee and to dispense with his services if so desired.

"There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act." *Driscoll v. Howe,* 181 Mass. 416. Quoted with approval by this court in *Standard Oil Company v. Anderson,* 212 U. S. 215.

The facts of this case are almost identical with those in *Standard Oil Co. v. Anderson,* 212 U. S. 215. In that

case the work being performed was that of loading cases of oil into the hold of a vessel. The work of loading was being performed by a master stevedore. The cases of oil were conveyed from the dock to the hatch, being hoisted then to a point over the hatch whence they were loaded into the hold. The motive power was furnished by a steam winch and drum which were owned by the oil company and placed on its dock about 50 feet distant from the hatch. All of the work of loading was done by the employees of the master stevedore except the operation of the winch which was done by a winchman in the employ of the oil company. The stevedore had agreed to pay the oil company a specified sum for the hoisting.

The method of loading was very much the same as in this case. The winch and winchman were at a place where it was impossible to determine the proper time for lowering and hoisting of the cases of drums and the winchman, necessarily, depended upon signals given by others. These signals were given by an employee of the master stevedore who stood upon the deck of the ship and gave signals to hoist or lower the cases of drums. The negligence in that case consisted of the winchman lowering a draft before receiving the signal.

In the instant case there was no more authoritative control over the crane operator than the stevedore had over the winchman in the *Standard Oil* case. It seems impossible to us that these two cases can be distinguished.

In this case the crane operator was performing the work in which his employer was engaged and for which it was being paid. As to the similar situation in the *Standard Oil* case, the court said (p. 226):

> ". . . We must inquire whose is the work being performed—a question which is usually answered by

ascertaining who has the power to control and direct the servants in the performance of their work. *Here we must carefully distinguish between authoritative direction and control, and mere suggestions as to the details or the necessary cooperation, where the work furnished is a part of a larger undertaking.*" (Italics ours.)

* * *

". . . The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the *work* they did to the stevedore. That *work* was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servants, under its own control." (p. 225) (Italics ours.)

After a full consideration of the various contentions of the parties, the court concluded (p. 226):

"Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. *But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos.* The giving of the signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters." (Italics ours.)

We call your attention here to the fact that the Circuit Court of Appeals referring to the employment of the crane operator stated: "Furthermore, he was paid for his services by the steamship company through the Navigation District" (R. 591). We submit that this statement is not jus-

tified by the evidence as it clearly appears from the record that the crane operator was paid by the Navigation District as its salaried employee and that the only amount which the petitioner paid was the hourly rate as specified in the tariff for the use of the crane (R. 283, 387, 297).

The decision in *Smith Bros., Inc. v. O'Bryan,* 127 Tex. 439; 94 S. W. 2d 145 (Tex. Com. App. 1936), is in accord with the decision of this court in the *Standard Oil* case.

In that case Smith Bros. was engaged in the business of general contracting. It owned no trucks, but hired trucks with drivers from one Henson and various other persons; and it did not employ or pay any of the drivers of the trucks which hauled its materials. It did control the operation of said trucks in the following important particulars:

It directed the particular materials to be hauled, the point at which materials should be loaded and delivered, and determined the number of drivers it would require. It had no agreement with any one of the truck owners for any particular length of time on one job, or to complete any particular job, or to carry any particular material, or any particular number of loads. It fixed the rate of pay to be allowed to the owners of the trucks. If a trucker did not appear on the job when notified to do so, or if he left the work without permission, the defendant retained the right to refuse him further work. It also reserved the right to pass upon the quality of the equipment and if a driver furnished by an owner was not satisfactory, it could refuse to give him any work and require his employer to furnish a satisfactory driver. While the defendant did not supervise the actual speed at which the trucks were run, if the driver did not operate the same expeditiously it retained

the right to dispense with the services of the truck operated by him. The drivers of the various trucks receipted for the various materials delivered and reported accordingly to the defendant.

As to this situation the court said (p. 149):

> "Giving effect to every circumstance tending to show control over Henson by defendant, we are of the opinion that *they fall short of that control over* **details** *as regards to means, methods, and manner of doing the work necessary in order to make Henson a servant or employe of defendant.* The control evidenced by many of the particulars mentioned is generally found in every agreement between employer and independent contractor. In practically every case of employment of truck drivers the employer has a right to designate the materials to be hauled, to direct to whom and to where they are to be delivered, and to require a receipt showing delivery. He also has the right to require expeditious service to the end that the general results of the employment may be attained. Yet it has never been held that these elements of control were sufficient to negative the independence of the contract, when, as here, practically all of the predominant circumstances indicates that the relation is one of employer and contractor. . . ." (Emphasis by the Court on the word "details." Italics ours.)

While that case is not exactly in point on the facts, the principle announced thereby is controlling here.

There also the legal relation of the parties was determined on the undisputed facts.

The *O'Bryan* case has been followed by the Texas Commission of Appeals in *Schroeder v. Rainbolt*, 128 Tex. 269; 97 S. W. 2d 679 (1936); and *Cocke & Braden v. Ayer*, 129 Tex. 660; 106 S. W. 2d 1043 (1937).

It is referred to as a leading case and followed by the Texas Court of Civil Appeals in the following cases: *Morgan v. Olmsted-Kirk Co.*, 97 S. W. 2d 260; *Scheuing v. Challis*, 104 S. W. 2d 1113 (1937); *Peyton Packing Co. v. Collis*, 110 S. W. 2d 625 (1937); *Burton Lingo Co. v. Armstrong*, S. W. 2d 791; *Younger Bros. v. Moore*, 135 S. W. 2d 781 (1939); *Linden Lumber Co. v. Johnston*, 128 S. W. 2d 121 (1939); and *Davis v. General Acc. Fire & L. Assur. Corp.*, 127 S. W. 2d 526 (1939).

On the authority of *Smith Bros. v. O'Bryan, supra*, the Circuit Court of Appeals should have decided that the directions given by the petitioner's employees to the crane operator amounted to necessary cooperation and fell short "of that control over details as regards to means, methods and manner of doing the work necessary in order to make" the crane operator a servant of the petitioner.

The Circuit Court of Appeals cited as authority for its decision the cases of *Liberty Mutual Insurance Co. v. Boggs*, 66 S. W. 2d 787 (1933); and *Ochoa v. Winerich Motor Sales Co.*, 127 Tex. 542, 94 S. W. 2d 416.

The case of *Liberty Mutual Insurance Co. v. Boggs*, was a claim under a workmen's compensation policy by the dependents of the deceased employee against his alleged employer. The question involved in that case was whether the person was an employee or an independent contractor. It is also to be noted that this case was decided prior to the *O'Bryan* case.

In *Ochoa v. Winerich Motor Sales Co.* again the question was as to whether a particular person was an employee of his alleged employer or an independent contractor. In that case an automobile mechanic was directed to do a particular job and was instructed as to the particular manner

in which he should perform it. He was held to be an employee.

Neither of these cases deals with the question here involved, viz., which one of two alleged employers was the person served.

The provision of the tariff referred to at length by the court below was not conclusive as to the control of the crane operator. It may have the effect of fixing an ultimate liability between the Navigation District and the petitioner as to who might be liable in case of injury or damage, conceding it to be valid. It was obviously not a contract made for the benefit of the respondent and we submit that it does not, in terms, constitute the petitioner the employer of the crane operator, particularly when it is considered that the petitioner was forced to accept whatever operator this public authority furnished to operate its machine and that the tariff made no provision for the use of same without an operator so furnished.

CONCLUSION.

We submit, therefore, that contrary to decision of this Court in *Erie Railroad Company v. Tompkins, supra,* the Circuit Court of Appeals has failed to apply the law of Texas as declared by its highest court; that the principle involved is of importance to others than the parties hereto; and that the petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

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Philadelphia, Pennsylvania,
July 26, 1940.